Nos. 85-541, 85-584 and 85-717

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
APR 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC., PETITIONER

v.

ARTHUR QUILLER, ET AL.

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

A provision of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, preempts the application of state usury laws to loans secured by first liens on residences, including mobile homes. With respect to mobile home loans, the preemption provision applies only to loans that "comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(c)), which provide, inter alia, that the lender may take no action to exercise certain remedies upon a default without giving the borrower 30 days' notice and opportunity to cure. The court of appeals ruled that the loan contract in Nos. 85-541 and 85-717 contained language inconsistent with the borrower's rights under this provision and that preemption was therefore inapplicable and the Georgia usury law was applicable to this loan. The question presented is:

> Whether the court of appeals misread the Act and the Bank Board's regulations when it concluded that federal preemption of state usury laws is inapplicable to a loan contract that contains language inconsistent with the borrower's federal law right to notice and opportunity to cure defaults.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Chicago St. L. & N.O.R.R. v. *Pullman Southern Car Co.*, 139 U.S. 79	12
Connolly v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986)	12
Doyle v. *Southern Guaranty Corp.*, No. CV 184-180 (S.D. Ga. Jan. 15, 1985)	16
Ehrman v. *Manning*, 177 Ga. App. 442, 339 S.E.2d 652	16
Fountain v. *Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906	16
Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685	12
United States Trust Co. v. *New Jersey*, 431 U.S. 1	12
Ward v. *Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729	16

Statutes and regulations:

Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Tit. V, 94 Stat. 161 *et seq.*:	
§ 501, 94 Stat. 161-163 (12 U.S.C. 1735f-7 note)	1, 15
§ 501(a)(1), 94 Stat. 161	2
§ 501(a)(1)(C)(iii), 94 Stat. 161	2
§ 501(a)(1)(C)(vi), 94 Stat. 161	2
§ 501(a)(2), 94 Stat. 162	14
§ 501(c), 94 Stat. 162	2, 3
§ 501(c)(1), 94 Stat. 163	3
§ 501(c)(2), 94 Stat. 163	3, 8
National Housing Act, 12 U.S.C. 1701 *et seq.*:	
§ 527(b), 12 U.S.C. 1735f-5(b)	2
§ 527(b)(2)(A), 12 U.S.C. 1735f-5(b)(2)(A)	2
§ 527(b)(2)(D), 12 U.S.C. 1735f-5(b)(2)(D)	2

Statutes and regulations—Continued: Page

15 U.S.C. 1602(f) 2
Ala. Code § 8-8-5 (1984) 14
Alaska Stat. § 45.45.010(b) (Supp. 1985) 14
Ariz. Rev. Stat. Ann. (Supp. 1985):
§ 44-1201(A) 14
§ 44-6002 14
Cal. Health & Safety Code § 18039.5 (West 1984) 14
Colo. Rev. Stat. § 5-13-105 (Supp. 1985) 14
Conn. Gen. Stat. Ann. § 37-9 (West Supp. 1985) 15
Del. Code Ann. tit. 5, § 2907 (Supp. 1985) 15
Ga. Code Ann.:
§ 7-4-3 (Supp. 1985) 15
§ 7-4-5 (Supp. 1985) 15
§ 7-4-20 (Supp. 1985) 14
§§ 10-1-30 *et seq.* (1982) 15
Hawaii Rev. Stat. § 478-12 (Supp. 1984) 14
Idaho Code § 28-49-105 (Supp. 1985) 14
Ill. Ann. Stat. ch. 17, § 6404 (Smith-Hurd Supp. 1985) ... 15
1980 Iowa Acts ch. 1156, § 32
Kan. Stat. Ann. § 16-207a (1981) 14
Ky. Rev. Stat. Ann. (Bobbs-Merrill Supp. 1984):
§ 360.010(1)(b) 15
§ 360.150(2) 15
§ 360.150(13) 15
Me. Rev. Stat. Ann. tit. 9-A, § 1-110 (Supp. 1985) 14
1981 Mass. Acts ch. 231 § 2 14
Minn. Stat. Ann. § 47.203 (West. Supp. 1986) 14
Mont. Code. Ann. § 31-1-241(1) (1985) 14
1982 Neb. Laws L.B. 623 14
1981 Nev. Stat. ch. 668, § 11 14
N.H. Rev. Stat. Ann. § 361-A:8 (1984) 14
N.J. Stat. Ann. § 17:16C-41 (West 1984) 15
N.M. Stat. Ann. § 56-8-11.1 (Supp. 1985) 14
N.Y. Pers. Prop. Law § 404(1) (McKinney Supp. 1986) .. 15
N.C. Gen. Stat. § 24-2.3 (Supp. 1985) 14

Statutes and regulations—Continued: Page

Or. Rev. Stat. Ann. § 82.010 (1985) 14

1981 S.C. Acts No. 6 14

1982 S.C. Acts No. 385 14

S.D. Codified Laws Ann. § 54-3-15 (Supp. 1984) 14

Utah Code Ann. (Supp. 1985):

§ 15-1-1 14

§ 70C-2-101 14

Va. Code:

§ 6.1-330.21 (1983) 14

§ 6.1-330.37 (1983) 14

§§ 46.1-515 *et seq.* (1980 & Supp. 1985) 14

1981 Wis. Laws ch. 45, § 50 14

Wyo. Stat. (Supp. 1985):

§ 40-14-212 15

§ 40-14-348 15

12 C.F.R.:

Section 590.2 2

Section 590.4 3

Section 590.4(d) 3, 11

Section 590.4(e) 3, 11

Section 590.4(f) 3, 11

Section 590.4(g) 3, 11

Section 590.4(h)(1) 3, 8, 9, 11

Miscellaneous:

6A A. Corbin, *Corbin on Contracts* (1962) 10

Domestic Financial Statistics, 72 Fed. Res. Bull. A40 (1986) 13

H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. (1980) 10

Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 99th Cong., 1st Sess. (1985) 14

S. Rep. 96-368, 96th Cong., 2d Sess. (1979) 2, 9, 10, 16

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-541

BARCLAYSAMERICAN/CREDIT, INC., PETITIONER

v.

ARTHUR QUILLER, ET AL.

No. 85-584

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

No. 85-717

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, was designed to attack two primary causes of a severe shortage of mortgage credit. DIDMCA provided for

phased removal of federal interest rate restrictions on deposits in federally insured financial institutions, permitting such institutions to offer competitive rates and thereby enhance the resources available for mortgage loans. See S. Rep. 96-368, 96th Cong., 2d Sess. 3-4 (1979). DIDMCA also provided for preemption of state usury limits on residential mortgage loans, permitting such institutions to charge sufficient rates to induce mortgage lending under then-prevailing conditions. § 501(a)(1), 94 Stat. 161; see S. Rep. 96-368, *supra*, at 19.[1]

Under Section 501(c) of DIDMCA (94 Stat. 162) federal preemption of state usury laws with respect to loans secured by "residential manufactured homes" (primarily mobile homes) is conditioned on compliance with certain borrower-protection requirements promulgated by the Federal Home Loan Bank Board (Bank Board):

> The provisions of subsection (a)(1) [the preemption section] shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—
>
> (1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

---

[1] Section 501(a)(1)(C)(iii) and (vi) (94 Stat. 161) adopts, with appropriate modification, the definitions of "federally related mortgage loan" and "lender" contained in Section 527(b) of the National Housing Act, 12 U.S.C. 1735f-5(b). Thus, DIDMCA's preemption extends to loans made by institutions regulated or insured by an agency of the federal government, or by any creditor, as defined in 15 U.S.C. 1602(f), "who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. 1735f-5(b)(2)(A) and (D). See 12 C.F.R. 590.2.

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge * * *; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

2. Pursuant to Section 501(c) (94 Stat. 162), the Bank Board issued regulations (codified at 12 C.F.R. 590.4) governing mortgage loans secured by manufactured housing where the lender charges an interest rate that exceeds the state usury limit. As required by Section 501(c)(1) (94 Stat. 163) the regulations require that each loan contract contain certain provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees (12 C.F.R. 590.4(d), (e), (f) and (g), respectively). As required by Section 501(c)(2) (94 Stat. 163) the regulations also provide that, subject to certain exceptions, the creditor may not exercise certain remedies in the event of default unless it has given the borrower 30 days' notice (12 C.F.R. 590.4(h)(1)):

Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against any debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days

> of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

The regulations do not require this provision to be recited in the loan contract.

3. The two cases that are the subjects of the three petitions before this Court arose from the purchase of two mobile homes in Georgia.

Nos. 85-541 and 85-717: Arthur and Lillie Mae Quiller, residents of South Carolina, purchased a mobile home in Georgia in June 1981. The price was $19,754.80 (Pet. App.11).[2] They made a cash down payment of $4,193.80 and financed the balance of $15,561 at an annual interest rate of 18.5% (*ibid.*).[3] The loan agreement is printed on a single sheet of paper labeled "(Mobile Home Only) FEDERAL PREEMPTION CONTRACT." The front of the contract, which contains the signatures and the terms specific to the transaction, recites the disclosures required by the Board's regulations. The front of the contract also contains the following language with respect to defaults (Pet. App. 12 (emphasis added)):

> DELINQUENCY CHARGE. If an installment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the installment or $5, whichever is less. Upon such delinquency, Holder may, *subject to any notice of right to*

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-541.

[3] Total finance charges over the fifteen-year contract life were $31,417.40, or $7,417.40 more than would have been permitted (in the absence of federal preemption) under Georgia's statutory 10% usury limit (Pet. App. 11; 85-541 Br. in Opp. 3).

> *cure*, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of * * * any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

The back of the contract contains several standardized terms, including the following (Pet. App. 13 (emphasis added)):

> Time is of the essence. Holder may collect a delinquency and collection charge on each installment in default for 15 days or more in an amount not exceeding 5% of each said installment or $5, whichever is less. If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder, *without notice, subject to any notice of right to cure*, become due and payable, less the required rebate of the Finance Charge, and rebate of any unearned insurance premiums included in this transaction, together with reasonable attorney's fees (15% if not prohibited by law) if this contract is referred for collection to an attorney, plus court costs.

No. 85-584: Jack and Evelyn Grant, residents of Georgia, purchased a mobile home in Georgia on February 23, 1982 (R. 10).[4] The price was $29,100. They made a cash down payment of $4,300 and financed the balance of $24,800 at an annual interest rate of 20.12%

[4] "R." refers to the district court record in No. 85-584.

(*ibid.*).[5] The contract contained the following provision with respect to late payments (*ibid.* (emphasis added)):

> In addition to the regular installment, Buyer agrees to pay as a delinquency and collection charge on each installment in default for more than 15 days, 5% of the unpaid amount of such installment, or $5, whichever is less. In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the *FINANCE CHARGE* designated as the Time Price Differential calculated by Pro-Rata Method *provided that Buyer shall be given notice of right to cure default* before Seller is permitted to exercise that right.

4. Each couple filed suit against its lender, claiming that the interest rate in its contract exceeded the Georgia usury limit of 10%. Both couples alleged that the state-imposed interest cap was not preempted by DIDMCA because, in the words of the Quiller complaint, the contracts failed to "specifically provide for * * * thirty (30)-day notice [prior to instituting any action leading to repossession or foreclosure]" (Pet. App. M3; see R. 5-7). Both couples sought declaratory judgments barring the lenders from collecting any finance charges. In addition, the Quillers sought penalties of $62,834.80 and the Grants sought $115,092.00 (double the total finance charges) for "willful" violations of state law. Each case was filed as a class action on behalf of persons who had financed purchases of mobile homes with the defendant in Georgia at a rate exceeding the state's usury limit and whose contracts

---

[5] Total finance charges over the fifteen-year contract life were $57,546, or $9,996.99 more than would have been permitted under the Georgia statute in the absence of federal preemption (see 85-584 Pet. 3; R. 10).

"did not specify that the purchasers were entitled to a thirty (30)-day notice prior to instituting any action leading to repossession or foreclosure" (Pet. App. M2; see R. 3-4).

5. The United States District Court for the Southern District of Georgia granted motions to dismiss both complaints for failure to state a claim.[6] Separate appeals in the two cases were heard by the same panel of the United States Court of Appeals for the Eleventh Circuit. A divided panel reversed in both cases.

All members of the panel agreed that neither the statute nor the regulations required that the borrower's federal right to notice be recited in the contract (Pet. App. B5-B7). However, the majority concluded in *Quiller* that if a contract does contain language that "permits the creditor to repossess or foreclose * * * upon default," then DIDMCA is violated and "the creditor cannot claim the benefits of * * * preemption" (*id.* at B7). The majority examined the Quiller contract "through the eyes of the typical consumer" (*ibid.*) and held that certain language on the back of the contract[7] (" 'without notice, subject to any notice of right to cure' ") was contrary to the statute and regulations because it "would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure" (*id.* at B8 (emphasis in original)). The court held that therefore the terms and conditions of the loan did not comply with the federal requirements and the loan was not entitled to preemption.

In *Grant*, the same divided panel found that the contractual language at issue in that case (stating that the lenders may declare all installments "immediately" due

---

[6] The *Quiller* case was originally filed in state court and was removed to federal court by the defendant. The *Grant* case was filed initially in the federal court as a diversity action.

[7] The court did not mention the language on the front of the contract, *i.e.*, "subject to any notice of right to cure."

and payable " 'provided that Buyer shall be given notice of right to cure default' ") was "directly contrary" to the Act and the Board's regulations (Pet. App. E3 (citation omitted)). Accordingly, as in *Quiller*, the panel reversed the district court's judgment on the pleadings.

6. Both cases were then reheard en banc. By a vote of six to five, the court reinstated without change the panel opinion in *Quiller*, which found a violation of the statute. But in *Grant* the court split eight to three the other way, finding no violation. The majority opinion in *Grant* explained the different results in the two cases by noting that the Grant contract "expressly condition[s]" the right to accelerate upon default "in clear, mandatory terms upon the debtor's receipt of notice of right to cure" (Pet. App. D9). Although, as the court acknowledged, the length of the grace period was not stated in the contract, the majority concluded that the Grant contractual language was "not clearly contrary to the requirements of the statute and regulations" (Pet. App. D2, D4).

Both decisions evoked strong dissents. In *Quiller*, the dissenting judges stated that the contract did not conflict with the Act or the regulations since the right to notice is not "absolute." The dissenting judges also suggested that if the contract misstated the federal requirement "a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer" (Pet. App. A6). In *Grant*, the dissenting judges on the en banc court would have found a violation even though the contract was "not as vague or equivocal as the qualifying clause in the *Quiller* contract" (Pet. App. D11).

DISCUSSION

The court of appeals has misconstrued Section 501(c)(2) of DIDMCA and 12 C.F.R. 590.4(h)(1). Section 501(c)(2) directs the Bank Board to adopt a regulation requiring

creditors to give 30 days' notice under certain circumstances. The Bank Board obeyed this direction: 12 C.F.R 590.4(h)(1) provides that, with certain exceptions, a creditor may not exercise certain remedies under a loan contract enjoying federal preemption unless it has given the borrower 30 days' notice. This regulation is self-enforcing: it does not require that the borrower's federal right to notice be set forth in the contract, and any language in the contract that is inconsistent with the borrower's federal right to notice is invalid and unenforceable. Congress and the Bank Board did not intend, nor is it logical, that such inconsistent language should result in loss of preemption.

The holdings in these cases erroneously cast doubt on the validity of a large amount of manufactured housing credit extended under DIDMCA. The impact will be felt by lender institutions and other present holders of such credit, many of which are federally insured. Moreover, because the doubt is one that cannot be resolved on the face of the instruments but would require judicial construction of each allegedly inconsistent phrase, the approach taken below will introduce unnecessary confusion into the secondary markets for such loans. Accordingly, and although the potential economic impact of these decisions cannot be quantified with precision, we believe that review by this Court is warranted.

1. Congress enacted DIDMCA to remedy the severe shortage of mortgage credit that had resulted from rising interest rates. See. S. Rep. 96-368, *supra*, at 3-4. One of the problems was that depository institutions were inhibited from making mortgage loans in states whose usury laws prevented them from charging a market rate of interest. Congress concluded that a statutory "modification in state usury laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national

secondary market in mortgage lending." S. Rep. 96-368, *supra*, at 19.[8] As the Senate report explained (*ibid.*):

> Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts.

Section 501(c) of DIDMCA provides that the preemption provision shall not apply to a loan unless its terms and conditions "comply with consumer protection provisions [to be] specified in regulations" of the Bank Board. The statute contemplates regulations of two types: regulations requiring certain provisions to be set forth in each contract and regulations imposing self-enforcing requirements and prohibitions. Neither type of regulation would create any doubt about the validity of a loan contract that could not be resolved by examining the face of the contract.[9]

Section 501(c)(2) permits the Bank Board to adopt a regulation with respect to notice that is of the self-enforcing type: it provides that the regulations shall "re-

---

[8] As a practical matter, prior to DIDMCA borrowers like the plaintiffs found it difficult or impossible to obtain any home financing. See, S. Rep. 96-368, *supra*, at 19; see also 6A A. Corbin, *Corbin on Contracts* § 1498, at 678 (1962) (usury laws "deprive those whose credit is weakest of the opportunity to borrow at all").

For this reason, the court of appeals erred in viewing expanded consumer protection measures as the "price" lenders must pay for the right to charge higher interest rates (Pet. App. B9). The new right of lenders to charge market interest rates benefited both lenders and borrowers by making credit available.

[9] This was important to Congress, which did not want the consumer protection provisions to defeat the primary purpose of making credit more readily available. For example, the conference report states, "before exercising this authority [to prescribe additional protections], the Board should carefully * * * study the implications of each additional requirement, including consideration of the economic impact on creditors and consumers of each requirement." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 79-80 (1980).

quire a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances)." Accordingly, 12 C.F.R. 590.4(h)(1) is a self-enforcing prohibition against acceleration or foreclosure without 30 days' notice except under specified circumstances. The regulation does not require that the right to notice be set forth in the loan contract,[10] and the Board has consistently adhered to the view that the regulation does not require manufactured housing loan agreements to include a provision for 30 days' notice in the event of default. See Pet. App. J1-J2 (opinion of Bank Board's general counsel); *id.* at K1-K8, L1-L9 (Bank Board amicus curiae briefs in court of appeals).

2. The court of appeals recognized that the right to notice need not be set forth in the loan contract (Pet. App. B5 (emphasis in original)):

> The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves.

But the court then ruled that if the contract does contain remedies language that a court finds contrary to the borrower's federal right to notice, preemption is lost. The court apparently assumed that the loan contract could "authoriz[e] conduct contrary to" federal law. Pet. App. B7 (emphasis omitted). On that assumption, the court examined the language in each contract to see whether it

---

[10] By contrast, the regulations do require certain consumer protection provisions to be set forth in the loan contract. See 12 C.F.R. 590.4(d), (e), (f) and (g). Any failure to comply with these disclosure rules is discernible on the face of the contract and results in loss of preemption.

"authorized" contrary conduct. It concluded that the loan contract in *Quiller* gave the lender rights contrary to the regulations, defeating preemption.

The court of appeals apparently failed to recognize that the Act and the regulations set forth a federal 30-day notice requirement that the lender and borrower have no power to nullify. Obligations "imposed by law, as necessary to the public interests, * * * could not be dispensed with by the agreement of the parties." *Chicago, St. L. & N.O.R.R.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 90 (1891). See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.17 (1977); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 692 (1897). Any misstatement in a loan contract is simply unenforceable. As this Court recently stated in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12, "[i]f the regulatory statute is otherwise within the powers of Congress * * *, its application may not be defeated by private contractual provisions."

Accordingly, if the loan contract in *Quiller* misstated the borrower's right to notice,[11] the misstatement did not reduce the borrower's rights that arise by force of the regulation if the lender has elected to preempt state usury law. Preemption is not, in this respect, dependent on the language of the contract, and an arguable misstatement of a right the borrowers might have under certain circumstances in the future did not entitle the borrowers to

[11] The court of appeals' conclusion that the Quiller contract purported to authorize conduct contrary to federal law is itself highly questionable. That conclusion was based on the contract's departure from what the court perceived as the statute's "*absolute* right to cure" (Pet. App. B8 (emphasis in original)). As the Bank Board advised the court (Pet. App. E14), however, the notice requirement is not absolute. The Act and the regulations expressly contemplate situations in which notice need not precede the remedies for default (*i.e.*, abandonment, extreme circumstances, or the third default within a year).

the windfall of a reinstatement of the usury statute after they had received the loan they bargained for and the protection of the federal notice requirement.[12]

3. The court of appeals' ruling casts doubt on the enforceability of a large quantity of outstanding manufactured housing loans. Moreover, such doubts cannot be resolved by examining the face of the contracts but will require an assessment in each instance of the risk that a court will later find language in the contract inconsistent with the notice requirement of the federal regulation. (This assessment may, as illustrated by the range of views below, be difficult to make.) The court of appeals' approach would therefore tend to reduce the marketability of all such loans, contrary to the central purpose of DIDMCA to encourage a flow of capital into home loans.

While few loans at rates in excess of state usury limits are being written today, there is a large number of outstanding loans that this en banc decision wrongly places under a cloud. In 1985, the amount of outstanding credit extended for mobile home purchases stood at almost $26 billion. *Domestic Financial Statistics*, 72 Fed. Res. Bull. A40 (1986). Part of that sum is attributable to loans not dependent on federal preemption: loans that preceded DIDMCA; loans made in the 14 states that had no usury

---

[12] The brief in opposition in No. 85-541 makes several references (at 5-6, 9-11) to conduct that, respondents contend, would divest the lender of the protections of federal preemption without regard to the contractual language. The complaint makes no such claim, however, and is directed exclusively to the language of the loan agreement. Accordingly, respondents' contentions of unlawful conduct have no bearing on the issue before this Court. The district court proceedings in this case terminated when the lender's motion to dismiss the complaint for failure to state a claim was granted. In that posture, only the allegations of the complaint (*i.e.*, the contract's purported shortcomings in disclosure) are considered. The court of appeals therefore did not comment on the conduct allegations and they are not properly before this Court.

limits or had limits higher than market rates;[13] and loans made recently at lower interest rates. In addition, between 1980 and 1983 fifteen states implemented DIDMCA's provision for opting out of the federal usury preemption and returning to state-imposed usury standards.[14] In those states, therefore, DIDMCA provided the basis for lending only until the effective date of each state's override legislation. In addition, eight other states have eliminated usury limits for some or all manufactured home loans.[15] Some

[13] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong., 1st Sess. 220 (1985).

[14] Under DIDMCA § 501(a)(2) (94 Stat. 162) states were given the opportunity, until April 1, 1983, to override the preemptive provisions of the Act. The following states did so (the effective dates of the override laws are noted in parentheses): Colo. Rev. Stat. § 5-13-105 (Supp. 1985) (July 1, 1981); Ga. Code Ann. § 7-4-20 (Supp. 1985) (Mar. 31, 1983); Hawaii Rev. Stat. § 478-12 (Supp. 1984) (May 30, 1980); Idaho Code § 28-49-105 (Supp. 1985) (Mar. 31, 1983); 1980 Iowa Acts ch. 1156, § 32 (May 9, 1980); Kan. Stat. Ann. § 16-207a (1981) (May 17, 1980); Me. Rev. Stat. Ann. tit. 9-A, § 1-110 (Supp. 1985) (May 18, 1983); 1981 Mass. Acts ch. 231, § 2 (Sept. 2, 1981); Minn. Stat. Ann. § 47.203 (West Supp. 1986) (June 2, 1981); 1982 Neb. Laws L.B. 623 (July 17, 1982); 1981 Nev. Stat. ch. 668, § 11 (June 14, 1981); N.C. Gen. Stat. § 24-2.3 (Supp. 1985) (Mar. 31, 1983); 1981 S.C. Acts No. 6 (Mar. 2, 1981); 1982 S.C. Acts No. 385; S.D. Codified Laws Ann. § 54-3-15 (Supp. 1984) (Mar. 5, 1981); 1981 Wis. Laws ch. 45, § 50 (Nov. 1, 1981).

[15] See Ariz. Rev. Stat. Ann. §§ 44-1201(A), 44-6002 (Supp. 1985); Cal. Health & Safety Code § 18039.5 (West 1984); Mont. Code Ann. § 31-1-241(1) (1985); N.H. Rev. Stat. Ann. § 361-A:8 (1984); N.M. Stat. Ann. § 56-8-11.1 (Supp. 1985); Or. Rev. Stat. § 82.010 (1985); Utah Code Ann. §§ 15-1-1, 70C-2-101 (Supp. 1985); Va. Code §§ 6.1-330.37, 6.1-330.21 (1983); *id.* §§ 46.1-515 *et seq.* (1980 & Supp. 1985). In other states, there are no interest limits for certain types of loans, but it is unclear from the statutes whether loans for the purchase of mobile homes fall within those provisions. *E.g.*, Ala. Code § 8-8-5 (1984); Alaska Stat. § 45.45.010(b) (Supp. 1985) (no limit for

of the remaining states adjusted their interest rate ceilings upward to reflect market conditions, so that as a practical matter Section 501 became progressively less significant in stimulating loans.[16] Nevertheless, the Bank Board estimates that of the $26 billion in outstanding credit secured by mobile homes, at least $4 billion is dependent on federal preemption.

The court of appeals' ruling would make the enforceability of these loans not only uncertain but dependent in many instances on judicial construction of language alleged to be inconsistent with the notice regulation. The decision will, in the Bank Board's view, have a direct effect on the secondary market for such mortgage loans (and securities backed thereby).[17] This is a market in which

---

loans over $25,000); Conn. Gen. Stat. Ann. § 37-9 (West Supp. 1985) (no limit for loans extended by certain financial institutions); Del. Code Ann. tit. 5, § 2907 (Supp. 1985) (motor vehicle financing); Ill. Ann. Stat. ch. 17, § 6404 (Smith-Hurd Supp. 1985); Ky. Rev. Stat. Ann. § 360.150(2) and (13) (Bobbs-Merrill Supp. 1984); *id.* § 360.010(1)(b); N.J. Stat. Ann. § 17:16C-41 (West 1984); N.Y. Pers. Prop. Law § 404(1) (McKinney Supp. 1986) (retail installment sales); Wyo. Stat. § 40-14-212 (Supp. 1985) (no limit over $25,000); *id.* § 40-14-348 (no limit over $25,000).

[16] Market interest rates are at present below the usury limits in virtually all states; there is, accordingly, no substantial reliance on federal preemption at this time. Market conditions are not static and could of course alter that situation.

[17] Because the court of appeals' decision in *Quiller* is interlocutory, the direct impact of the decision on the parties is unknown. The plaintiffs contend that under the state law in effect at the time the suit was commenced (Ga. Code Ann. §§ 10-1-30 *et seq.* (1982)), the penalty for wilful excessive interest rates was forfeiture of the entire finance charge ($31,417.40) plus twice that amount as a penalty. The Georgia law has since been amended, however. In 1983, Georgia repealed all interest rate limitations on motor vehicle loans, including mobile homes (Ga. Code Ann. §§ 7-4-3, 7-4-5 (Supp. 1985)). Under the new law, violations of disclosure provisions will result in damage awards no smaller than $100 and no greater than $1,000. Recent Georgia Supreme Court decisions strongly suggest that the state would

Congress expressly sought to ensure stability (see S. Rep. 96-368, *supra*, at 19 ("it is the Committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section")). We therefore suggest that, notwithstanding the absence of a conflict among the circuits, this Court should put an early end to the potential dislocation that could be caused by the decision below by reviewing the question whether preemption can be defeated by contract language that does not accurately state the borrower's federal right to notice.[18]

---

apply these amendments to the instant case. See *Ward* v. *Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729, 730-731 (1985); *Fountain* v. *Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906, 907-908 (1984); see *Ehrman* v. *Manning*, 177 Ga. App. 442, 339 S.E.2d 652 (1986). One federal district court decision that precede *Ward*, however, indicates that the matter is not free from doubt. *Doyle* v. *Southern Guaranty Corp.*, No. CV 184-180 (S.D. Ga. Jan. 15, 1985).

The interlocutory posture of the *Quiller* case need not deter this Court's review. The important federal statutory issue has been resolved with finality for purposes of the case. Unless it is reversed, the decision below will control all further proceedings in *Quiller* and will govern the decisions in the related cases currently pending in the Eleventh Circuit (see 85-541 Pet. 8 n.4).

[18] That is the essence of the second question presented in No. 85-541, the only question in the three petitions that merits a grant of certiorari. The first question in No. 85-541 turns on the particular language in the Quiller-Barclays contract and is of little consequence other than to the parties. The same is true of question two in No. 85-584. The remaining questions in Nos. 85-584 and 85-717 would be resolved by a decision in No. 85-541. Accordingly, if certiorari is granted on question two in No. 85-541, the other cases should be held pending this Court's disposition. Should the petition in No. 85-541 be denied, however, then the companion petitions should also be denied.

CONCLUSION

The petition for a writ of certiorari in No. 85-541 should be granted with respect to the second question presented and the petitions in Nos. 85-584 and 85-717 should be disposed of in light of this Court's disposition in No. 85-541.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
BRUCE G. FORREST
Attorneys

APRIL 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986 — 431-502/20,548